BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL A. BARNEY Claimant	)	
VS.	)	
WICHITA SE KANSAS TRANSIT, INC. Respondent	)	Docket No. 1,002,002
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requested review of the August 18, 2003 Award and the September 18, 2003 Award Nunc Pro Tunc by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on February 10, 2004.

APPEARANCES

Timothy A. Short of Pittsburg, Kansas, appeared for the claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board the parties agreed that, although not listed in the Award, Marsha Ogle's deposition taken on July 11, 2003, was to be considered and included in the evidentiary record.

ISSUES

The Administrative Law Judge (ALJ) limited claimant to a 7.5 percent permanent partial whole person functional impairment. The ALJ averaged the ratings provided by Drs. Chris D. Fevurly and Edward J. Prostic. The ALJ denied claimant's request for a work disability finding that claimant's treating physicians had released him without permanent restrictions and after taking FMLA leave the claimant failed to return to work or provide

additional medical certification of his inability to work. Based upon those facts the ALJ determined claimant self terminated his employment with respondent. Stated another way, the claimant failed to demonstrate a good faith effort to retain appropriate employment.

The claimant requested review of the nature and extent of disability. Specifically, claimant argues he did have work restrictions that prevented his return to work and that he did not voluntarily terminate his employment with respondent.

Conversely, the respondent argues that the functional impairment should be decreased to 5 percent but otherwise requests the Board to affirm the ALJ's Award in all other respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed for respondent as a trailer mechanic and also performed collision repair body work. While at work claimant was assisting in the removal of a sliding rear door from a trailer when he slipped and twisted but caught himself before he fell injuring the thoracic area of his back.

Initially, claimant sought chiropractic treatment but was then referred to the company physician, Dr. Earl Cornell. Dr. Cornell had x-rays taken of claimant's thoracic spine which were read as normal. Dr. Cornell also ordered a bone scan and a Dexa scan. The doctor concluded claimant had suffered a sprain/strain and ordered physical therapy. Claimant then was referred to Dr. Kenneth Johnson who administered trigger point injections and additional physical therapy.

Claimant went to his personal physician who obtained an MRI of claimant's thoracic spine and referred claimant to Dr. William L. Dillon. Dr. Dillon examined claimant on February 5, 2002. Claimant gave the doctor a history of injury to his back from lifting at work in August. Claimant complained of thoracic back pain radiating around his rib cage. Dr. Dillon reviewed x-rays, a CT scan, a bone scan and an MRI of claimant's thoracic spine. The doctor noted the bone scan was normal, the CT was negative and the MRI revealed degenerative disk disease in the lower portion of the thoracic spine without any evidence of herniation. The doctor diagnosed claimant with aggravation of the preexisting degenerative disk disease.

Dr. Dillon noted that claimant was being treated with non-steroid anti-inflammatory medication and he did not recommend any change in that regimen. Dr. Dillon further did not recommend any restrictions other than to use proper body mechanics to avoid stressing the spine nor did the doctor provide a rating.

Dr. Chris D. Fevurly, board certified in internal medicine, occupational medicine and as an independent medical examiner, examined claimant on February 8, 2002, at respondent's request. Claimant complained of constant mid-back pain between his shoulder blades which radiated anteriorly. The pain was worse in the morning and was aggravated by bending, stooping and lifting.

The doctor noted that claimant had a fairly unremarkable examination other than tenderness to palpation over the thoracic area of his back. The doctor diagnosed claimant with chronic mid-thoracic pain which was not neurogenic (meaning that there is no spinal cord impingement nor injury and no nerve root entrapment nor injury). The doctor noted that claimant had a slight wedge deformity at T11-12 but a bone scan did not show any uptake at that region which the doctor concluded demonstrated it was not an acute deformity. The doctor further noted that about 15 percent of the general population have the same deformity.

Lastly, the doctor concluded claimant had mild to moderate symptom magnification. The doctor noted that upon examination claimant demonstrated significant pain behavior with sighing, facial grimacing and occasional loud moans which contrasted with how well he was able to move.

The doctor determined claimant was at maximum medical improvement for his chronic mid-thoracic pain and opined claimant had a 5 percent whole person impairment and fit into Category II of the thoracolumbar spine DRE model of the AMA *Guides*[1]. The doctor noted that restrictions should be based upon objective factors and there was nothing in the examination to indicate claimant needed restrictions.

Both Drs. Dillon and Fevurly concluded claimant did not need work restrictions. Consequently, claimant was released to return to his regular work without restrictions in February 2002. Claimant returned to work but noted that his pain in the mid-thoracic area of his back would radiate into the anterior chest. Claimant testified that as he continued working his back pain seemed to worsen.

Claimant testified that at work on March 22, 2002, he was sent to get a dolly converter which connects two 28-foot trailers together. Claimant testified that he told the dock foreman that he could not perform that task because the dolly was too heavy. Claimant testified that he received a written disciplinary warning and was forced to take FMLA for two months. Claimant testified that when it was time to return to work he was told that respondent would not take him back if he had any work restrictions. Claimant noted that his personal physician had imposed work restrictions and Dr. Prostic had told him to continue with those restrictions.

---

[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Marsha Ogle, respondent's director of human resources, testified that on March 22, 2002, claimant was given a written warning for insubordination and placed on six months probation. The insubordination was claimant's refusal to retrieve the dolly and his verbal altercation with the dock supervisor when the request was made.

The record is unclear of the exact date, but in early April the claimant apparently told his supervisor that he was unable to continue to perform his work. The supervisor referred claimant to Ms. Ogle. Ms. Ogle told claimant that if a personal condition prevented him from working he could request FMLA leave.

Ms. Ogle denied that claimant was forced to take FMLA leave. She noted that the treating physicians had released claimant to work without restrictions. She told claimant that unless the authorized treating physicians provided restrictions that she would consider any additional medical leave as personal medical leave.

Claimant then had his personal physician, Dr. Daniel N. Pauls, fill out the Physician Certification for Family or Medical Leave. Claimant was taken off work from April 12, 2002, through June 12, 2002, under FMLA leave. The form described the claimant as suffering back pain after lifting on August 17, 2001, with progressive severe pain.

The claimant was examined by Dr. Edward J. Prostic on April 22, 2002, at his attorney's request. Claimant complained of pain in his thoracic spine and upon examination demonstrated tenderness at approximately T-10. Dr. Prostic had x-rays taken of the thoracic spine which revealed no obvious abnormality. The doctor also reviewed a CT scan of the chest and thoracic spine as well as an MRI of the thoracic spine which all appeared normal.

Dr. Prostic concluded claimant had most likely suffered an annular tear of the lower thoracic disk. The doctor recommended work restrictions consisting of claimant self-restricting against heavy lifting, forceful pushing or pulling as well as repetitious bending or twisting at the waist. Lastly, the doctor opined claimant had a 10 percent permanent partial whole person functional impairment based upon the range of motion model of the AMA *Guides*. But the doctor admitted that he did not use the required two-point inclinometer to determine claimant's range of motion.

Dr. Prostic agreed that none of the objective medical tests indicated any evidence of injury to the thoracic spine and that although he diagnosed an annular tear, none of the records identified that condition.

When the two month time period for claimant's FMLA leave was over, Ms. Ogle called claimant and told him that he was scheduled to return to work the next day or he needed to provide medical documentation from the physicians that he could not return to work. Ms. Ogle again talked to claimant the next day and was told that claimant's lawyer was supposed to call respondent's lawyer about a return to work. Claimant noted that he

had been unable to reach his attorney and was unsure what he should do. Ms. Ogle then told claimant that a letter had already been sent regarding his termination from employment.

Because claimant did not return to work on June 13, 2002, he was sent a letter of termination dated June 14, 2002. The termination was based upon claimant's failure to return to work or provide additional medical documentation. The respondent changed claimant's work status to a voluntary quit effective June 13, 2002.

Claimant's attorney had sent a letter dated May 2, 2002, to respondent's counsel which requested accommodated employment and attached a copy of Dr. Prostic's restrictions. This letter was not forwarded to Ms. Ogle. But Ms. Ogle noted that if she had seen the restrictions she would have requested clarification because the doctor never imposed specific weight restrictions and instead just advised claimant to self restrict his heavy lifting, forceful pushing or pulling and repetitive bending or twisting at the waist.

Claimant began working for Ruskin Manufacturing in July 2002. He was initially paid $8.50 an hour and was making $9 an hour at the time of the regular hearing. He works on the assembly line.

Claimant's vocational expert, Mr. Jerry Hardin, concluded that applying Dr. Prostic's restrictions to the job tasks claimant performed during the 15 years preceding his accident would result in a 63 percent task loss. But by removing the duplicative tasks the claimant's task loss would be 70 percent. Dr. Prostic testified and adopted that analysis as his opinion regarding claimant's task loss.

The record in this case establishes that claimant was released to return to work without restrictions and continued to work until he took two months off under FMLA. Claimant noted that his work activities caused his back pain to worsen until he was unable to continue working and that is why he took FMLA leave.

The Kansas appellate courts, beginning with *Foulk*[2], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[3] Before claimant can claim entitlement to

---

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[4]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[5] where the accommodated job violates the worker's medical restrictions,[6] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[7] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

But it is claimant's burden to prove that he has made a good faith effort to retain appropriate employment. In this case, the ALJ concluded that when the claimant's FMLA leave expired he voluntarily failed to return to work for respondent. And because claimant was released to return to work without restrictions this failure demonstrated bad faith which resulted in claimant being limited to his functional impairment. The Board disagrees.

Claimant returned to work but his back pain increased to the point that he told his supervisor that he was unable to perform his job duties. The supervisor referred claimant to the human resources director. Ms. Ogle concluded that because the treating physicians had released claimant to return to work without restrictions his condition was personal and he would have to take FMLA. Respondent never offered to return claimant to the authorized treating physician for further treatment. Consequently, the claimant had his personal physician fill out the paperwork work to request FMLA, but the paperwork indicated claimant's back problem was caused by lifting on the date of his work-related injury.

While off work on FMLA the claimant was examined by Dr. Prostic. Claimant's attorney then sent respondent's attorney a letter asking if respondent would provide claimant accommodated work within Dr. Prostic's restrictions which were attached. This letter was sent before claimant's FMLA leave expired. Respondent did not reply to that inquiry. Because claimant was aware his attorney had inquired about a return to work for

---

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[6] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[7] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

respondent he tried to tell Ms. Ogle that his attorney had contacted respondent's attorney regarding his work status. However, Ms. Ogle was unaware of that letter and proceeded to advise claimant that a letter of termination had already been sent.

In summary, claimant took FMLA even though the reason for his back pain and need to be off work was the work-related injury. While off work claimant received restrictions from his doctor and his attorney had requested accommodated work within those restrictions. No response was made to that inquiry. Under those facts it cannot be said claimant exhibited bad faith or that he voluntarily terminated his employment. Instead, he had actively sought to return to accommodated work well before expiration of the authorized leave. And he had attempted to provide medical documentation supporting his need for accommodated work. Then when his FMLA leave expired he received a call that he should report to work or provide medical documentation that he could not return to work. When claimant attempted to explain that he thought his attorney had contacted respondent's attorney he was simply told the letter of termination was in the mail. Claimant did not act in bad faith in failing to return to work and the same cannot as easily be said about the respondent. The Board concludes claimant is entitled to a work disability analysis.

Because claimant's injuries comprise an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a) (Furse 2000). That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted

---

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995)

[9] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

Because claimant began working for Ruskin Manufacturing in July 2002, he clearly made a good faith effort to find employment after the respondent terminated him effective June 13, 2002. The evidence indicates claimant is earning $360 a week which, when compared to his pre-injury average gross weekly wage, results in a 33 percent wage loss.

The claimant testified that his personal physician imposed restrictions similar to those given by Dr. Prostic. However, Dr. Prostic's restrictions were simply for claimant to self-limit his heavy lifting, forceful pushing or pulling or repetitious bending or twisting at the waist. But the doctor did not provide any definition regarding what constitutes heavy, forceful or repetitious. And the fact that claimant was to self-limit would also require speculation regarding his definition of heavy, forceful or repetitious in order to determine which job tasks in his 15 year employment history he could no longer perform. Absent such specificity the attempt to provide a task loss is simply speculation. And Dr. Prostic's review of the task loss analysis provided by Mr. Hardin admittedly occurred just a few minutes prior to his deposition and appears to have been cursory at best. The Board finds claimant failed to meet his burden of proof to establish that he suffered a task loss.

The claimant has suffered a 33 percent wage loss and a 0 percent task loss which results in a 16.5 percent work disability.

AWARD

WHEREFORE, it is the finding of the Board that the Award and Award Nunc Pro Tunc of Administrative Law Judge Jon L. Frobish dated August 18, 2003, and September 18, 2003, respectively, are modified to reflect claimant suffered a 16.5 percent work disability.

The claimant is entitled to 5 weeks of temporary total disability compensation at the rate of $358.43 per week or $1,792.15 followed by 68.48 weeks of permanent partial disability compensation at the rate of $358.43 per week or $24,545.29 for a 16.5 percent work disability, making a total award of $26,337.44 which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of February 2004.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director